IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PEITION NO.9322 OF 2005
WITH
WRIT PETITION NOS.4230 & 4233 OF 2005

R.L. Ramchandani. ...Petitioner.

Versus

Smt.Indira Senapati & Ors. ...Respondents.

.....

Mr. P.K. Dhakephalkar with Mr.J. S. Deo for the Petitioner.
Mr. A.K. Abhynakar i/b. M/s. N.V. Vaishnav & Co. for the Respondents.

.....

CORAM : DR. D.Y. CHANDRACHUD, J.

June 26, 2006.

P.C.:

The Learned Trial Judge in the Court of Small Causes allowed two applications under Order 9 Rule 13 of the Code of Civil Procedure, 1908, and set aside ex-parte decrees passed in two suits, the first being a declaratory suit instituted by the tenant and the second, the landlord's suit for possession. That order has been confirmed by the Appellate Bench of the Court of Small Causes in revision. This is the subject matter of two of the three Writ Petitions before this Court. The third Petition seeks to impugn the order of the Trial Judge in the Court of Small Causes by which

possession was directed to be restored of the suit premises consequent upon the setting aside of the ex-parte decree.

RAD Suit 1975 of 1990 had been instituted by the tenant for a declaration of tenancy. LE&C Suit 145/171 of 1990 had been instituted by the landlord for possession under Section 41 of the Presidency Small Causes Court Act, 1882. An ex-parte decree was passed in both those suits on 10th February 2004. The decree was executed on 3rd November 2004. On 6th November 2004, an application was filed for setting aside the ex-parte decree under Order 9 Rule 13. In support of the application, an affidavit was filed on behalf of the Registered Clerk working in the office of the tenant's Advocate. The Registered Clerk deposed that he was employed by the Advocate concerned since 1972 and that he was looking after all Court administrative work including maintaining Court Diaries and filing of records. When a branch of the Court of Small Causes was set up at Bandra, a number of matters pertaining to the Bombay Branch were transferred to Bandra and at that stage, all briefs pertaining to these matters were handed over to an Advocate, Mr.Sunil Sawant. However, he returned the briefs in all the matters numbering about 30. The papers which were

returned included the papers of the suits instituted by the landlord in this case. The Registered Clerk deposed in his affidavit that the declaratory suits were on Board in Court Room No.34 on 21st July 2003 and were adjourned to 26th August 2003. This was noted by him in the Court diary. However, through oversight an entry was not made by him on 26th August 2003. In the meanwhile, a large number of briefs including the briefs pertaining to the said two suits were misplaced, as a result of which, the two suits could not be attended to on 26th August 2003 or thereafter. The Registered Clerk of the Advocate, therefore, admitted that the mistake was entirely his and a diary entry remained to be made through oversight. Apart from the affidavit of the Registered Clerk of the Advocate, the First Defendant filed an affidavit in support of the application. The deponent is a widow, 76 years age. She stated that her husband had expired in 1989 and that she has two daughters, one of whom is settled in the U.S., while the other resides in Bangladesh. The Second Defendant is her son who has been transferred by his employer to their Branch Office at Singapore. The First Defendant stated that she resided in the suit premises from 1971 until possession was taken over by the Court in execution of the decree. The First Defendant stated that she,

however, visited her son in Singapore and her daughter in the U.S. from time to time. The Second Defendant filed an affidavit stating that he was employed by Glencore India Pvt.Ltd. and until he was transferred to Singapore by his employer he was residing all along in the suit premises. The Second Defendant stated that he was transferred by his employer to their Branch Office at Singapore. His mother was stated to be residing with him and also with his sister who is in the U.S. He was informed while in Singapore of the execution of the decree.

On the material which was produced before the Court, the Trial Judge was of the view that there was no deliberate inaction or negligence on the part of the tenants in contesting the proceedings. The application for setting aside the ex-parte decree was duly supported by an affidavit of a Registered Clerk working with the Advocate for over two decades, who stated that an entry in the Court diary of the adjourned date remained to be made through oversight. The Trial Judge had the benefit of perusing the dairy maintained by the Clerk. The explanation which was tendered before the Court was found to be bonafide and proper. That order has been affirmed by the Appellate Bench of the Court of Small

Causes. This Court would not be justified in reappreciating the evidence and substituting its own view for the view which is justifiably formed by the Courts below and which in any event is correct and proper. The impugned order does not suffer from any infirmity.

The next question is that of the restoration of possession. In so far as this issue is concerned, it is evident from the record that while passing an order on 23rd December 2004 on the application which was taken out for restoration of possession, the Trial Judge recorded the submission of Counsel for the Plaintiff that the notice may be made absolute but the operation of the order be stayed until 20th January 2005. This concession has been recorded specifically in para 5 of the impugned order. The tenant was deprived of his possession in execution of the ex parte decree. The restoration of possession was a measure of restitution. An order for restitution falls within the meaning of the expression “decree” in Section 2(2) of the Code of Civil Procedure, 1908. The expression “decree” as defined is deemed to include the determination of any question within Section 144 of the Code. The order of the Trial Judge directing the restoration of possession as

and by way of restitution was not appealed against before the Appellate Bench of the Court of Small Causes. The record shows that parties proceeded on the basis that upon the restoration of the suits to file and upon setting aside of the ex-parte decree, an order for restoration of possession will have to be passed and that is the basis on which a concession has been made by Counsel appearing on behalf of the Plaintiff before the Trial Court. The Trial Court was of the view that since the Defendant-tenants had been deprived of their possession over the suit premises in execution of a decree of the Court, the principles of restitution in Section 144 required that possession should be restored to them consequent upon the setting aside of the decree. There is no error in the finding of the Trial Judge. On behalf of the Petitioner it is sought to be urged that the premises have not been used and are not required by the tenants. This would not be an appropriate and/or proper stage to enter any conclusive findings on this aspect of the matter since the suits now await trial. However, the material on record shows a due disclosure of facts by the First and Second Defendants before the Trial Court. The Second Defendant was employed in Mumbai and stayed in the suit premises till he was transferred by his employer to Singapore. The First defendant who

is the mother of the Second Defendant and a widow has stated that she has resided all along in the suit premises and after her son has been transferred to Singapore, she resided with him in Singapore and with her daughter at the U.S. The passport of the First Defendant shows the address of the suit premises as her permanent address. In this view of the matter, the order does not warrant interference under Article 227 of the Constitution.

On behalf of the Petitioner an apprehension has been expressed that the tenants may part with possession during the pendency of the proceedings before the Court of Small Causes. Counsel appearing on behalf of the Respondent-tenants submits an undertaking on instructions to the effect that possession of the suit premises is with the Defendants, who are parties to the suit and that the Defendants shall not create any third party rights, title or interest of whatsoever nature in the suit premises. The undertaking is accepted.

The Court of Small Causes is requested to endeavour to dispose of the suit expeditiously and preferably by the end of December 2006.

On the oral request of Learned Counsel for the Petitioner, the order for restoration of possession shall not be implemented for a period of four weeks from today so as to enable the Petitioner to have recourse to his remedies against the judgment.

The Petitions are dismissed.

....